

Before the  
**LIBRARY OF CONGRESS**  
**COPYRIGHT OFFICE**  
Washington, D.C. 20540

**GENERAL COUNSEL**  
**OF COPYRIGHT**

**JAN 8 1997**

**RECEIVED**

In re: Determination of Statutory	)	
License Terms and Rates for Certain	)	No. 96-5
Digital Subscription Transmissions	)	CARP DSTR
of Sound Recordings	)	

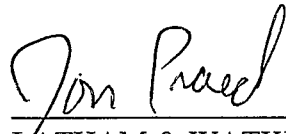
**MUZAK'S OPPOSITION TO RIAA'S MOTION TO COMPEL SERVICES TO  
IDENTIFY TO WHICH REQUEST EACH PRODUCED DOCUMENT IS RESPONSIVE  
AND RIAA's MOTION TO COMPEL MUZAK TO PRODUCE DOCUMENTS**

Muzak, L.P., through its attorneys, hereby opposes the RIAA's above-captioned motions to compel. Muzak believes that it has reached an agreement with the RIAA that moots these two motions to the extent they are directed to Muzak. Attached is a letter from Muzak's counsel to the RIAA's counsel, conveying certain information requested by the RIAA, confirming that the motions are rendered moot, and asking the RIAA to formally request the Copyright Office to dismiss the above motions to compel.

For all the above reasons, Muzak requests the Copyright Office to deny both of the RIAA's motions to compel, or grant it additional time in which to oppose the motions in light of its attempt to resolve these motions informally and its reliance on the RIAA's statement that the attached information would render its motions moot.

Respectfully submitted,

Dated: January 8, 1997



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Certificate of Service

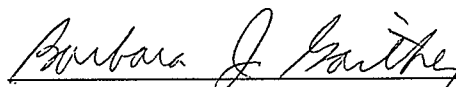
I hereby certify that on January 8, 1997, a copy of the foregoing Muzak's Opposition To RIAA's Motion To Compel Services To Identify To Which Request Each Produced Document Is Responsive And RIAA's Motion To Compel Muzak To Produce Documents was served by fax upon the following:

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January 8, 1997

## Via Facsimile (202) 942-5999

Steven M. Marks, Esq.  
Arnold & Porter  
555 Twelfth Street, NW  
Washington, D.C. 20004

Re: CARP DSTRA No 96-5

Dear Steve:

This letter accomplishes three purposes.

First, it supplements my December 17, 1996 letter to you, in which I provided information setting forth the requests to which each document produced by Muzak is primarily responsive. While that letter covered all documents that Muzak produced in direct response to the RIAA's request for documents, it did not cover those few documents that were attached to Muzak's direct case (as amended on November 15, 1996). Incorporating the prefatory language from my December 17th letter, please be advised that each of the documents attached to Mr. Funkhouser's amended testimony is responsive to Request #8 from the RIAA's October 3, 1996 Request for Documents to Muzak.

Second, it amends certain responses made by Muzak in response to the RIAA's request for documents. Specifically amended are four responses provided on October 10, 1996 (Responses # 6, 15, 17 and 20), and three responses provided on December 12, 1996 (Responses #1, 2 and 3), in connection with RIAA's October 3 and December 5, 1996 Requests for Documents to Muzak. For clarity's sake, I am stating both the request and the amended response below. Please be advised that Muzak hereby incorporates by reference into each of the following responses the General Objections & Conditions stated in its initial responses. Before setting forward those amendments, I wanted to note that you have not yet responded to my December

Steven M. Marks  
January 8, 1997  
Page 2

17th request that you clarify the statement you made in your December 16th letter concerning witnesses testifying based on their general knowledge or experience and any obligation/right to produce documents that flows therefrom.

MUZAK'S AMENDED RESPONSES TO RIAA'S OCTOBER 3, 1996 REQUESTS

**Request 6:** Page 3: Please provide all documents supporting the statement that "DCR's Music Choice expects to have 1 million subscribers by the end of this year" and "DMX anticipates having 1.5 million subscribers."

**Response:** Subject to and without waiving any of the foregoing General Objections, Muzak responds as follows: Mr. Funkhouser relied upon his general knowledge of and experience in the music industry when making this statement. Mr. Funkhouser is Vice President of Programming & Licensing of Muzak, and has served in that capacity since 1987. Prior to joining Muzak, he was Programming & Production Manager for Yesco Foreground Music, beginning in 1983. Before entering the business music field with Yesco, he had extensive experience in a variety of music fields, including broadcasting, studio recording, teaching, consulting and record company management, including the formation of his own commercial and music production company. In addition, documents submitted by both DCR and DMX in this proceeding support this statement.

**Request 15:** Page 3: Please provide all documents supporting the statement that "I do not believe that either of our competitors has yet turned a profit in this business."

**Response:** Subject to and without waiving any of the foregoing General Objections, Muzak responds as follows: Mr. Funkhouser relied upon his general knowledge of and experience in the music industry when making this statement. Mr. Funkhouser is Vice President of Programming & Licensing of Muzak, and has served in that capacity since 1987. Prior to joining Muzak, he was Programming & Production Manager for Yesco Foreground Music, beginning in 1983. Before entering the business music field with Yesco, he had extensive experience in a variety of music fields, including broadcasting, studio recording, teaching, consulting and record company management, including the formation of his own commercial and music production company. In addition, documents submitted by both DCR and DMX in this proceeding support this statement.

**Request 17:** Page 4: Please provide all documents supporting the statement that "Laws and regulations currently in place, including the Home Recording Act, already serve to discourage home-recording of music," including, but not limited to, all documents that identify such "laws and regulations" and all documents that analyze the effect of such "laws and regulations" on home recording.

Steven M. Marks

January 8, 1997

Page 3

**Response:** Subject to and without waiving any of the foregoing General Objections, Muzak responds as follows: Mr. Funkhouser relied upon his general knowledge of and experience in the music industry when making this statement. Mr. Funkhouser is Vice President of Programming & Licensing of Muzak, and has served in that capacity since 1987. Prior to joining Muzak, he was Programming & Production Manager for Yesco Foreground Music, beginning in 1983. Before entering the business music field with Yesco, he had extensive experience in a variety of music fields, including broadcasting, studio recording, teaching, consulting and record company management, including the formation of his own commercial and music production company. Notwithstanding Muzak's General Objection that it has no obligation to produce documents in the public domain of which it is not aware, Muzak has conducted a limited review of the public record and will either identify or produce documents in the public domain that support this statement.

**Request 20:** Page 5: Please provide all documents supporting the statement that "That rate was determined largely by the recording industry and forced on Music Choice as a part of a larger business transaction."

**Response:** Subject to and without waiving any of the foregoing General Objections, Muzak responds as follows: Mr. Funkhouser relied upon his general knowledge of and experience in the music industry when making this statement. Mr. Funkhouser is Vice President of Programming & Licensing of Muzak, and has served in that capacity since 1987. Prior to joining Muzak, he was Programming & Production Manager for Yesco Foreground Music, beginning in 1983. Before entering the business music field with Yesco, he had extensive experience in a variety of music fields, including broadcasting, studio recording, teaching, consulting and record company management, including the formation of his own commercial and music production company. In addition, Muzak believes the RIAA and/or its members are in possession of documents responsive to this request, and hereby requests that such documents be produced by the RIAA to all parties.

MUZAK'S AMENDED RESPONSES TO RIAA'S DECEMBER 5, 1996 REQUESTS

**Request 1:** Please provide all documents supporting the statement: "That rate was determined largely by the recording industry and forced on Music Choice as part of a larger business transaction."

**Response:** Subject to and without waiving any of the foregoing General Objections, Muzak responds as follows: Mr. Funkhouser relied upon his general knowledge of and experience in the music industry when making this statement. Mr. Funkhouser

Steven M. Marks

January 8, 1997

Page 4

is Vice President of Programming & Licensing of Muzak, and has served in that capacity since 1987. Prior to joining Muzak, he was Programming & Production Manager for Yesco Foreground Music, beginning in 1983. Before entering the business music field with Yesco, he had extensive experience in a variety of music fields, including broadcasting, studio recording, teaching, consulting and record company management, including the formation of his own commercial and music production company. In addition, Muzak believes the RIAA and/or its members are in possession of documents responsive to this request, and hereby requests that such documents be produced by the RIAA to all parties.

**Request 2:** Please provide all documents supporting the statement that there is a "tremendous growth in promotional value resulting from the proliferation of music services."

**Response:** Subject to and without waiving any of the foregoing General Objections, Muzak responds as follows: Mr. Funkhouser relied upon his general knowledge of and experience in the music industry when making this statement. Mr. Funkhouser is Vice President of Programming & Licensing of Muzak, and has served in that capacity since 1987. Prior to joining Muzak, he was Programming & Production Manager for Yesco Foreground Music, beginning in 1983. Before entering the business music field with Yesco, he had extensive experience in a variety of music fields, including broadcasting, studio recording, teaching, consulting and record company management, including the formation of his own commercial and music production company. In addition, Muzak believes the RIAA and/or its members are in possession of documents responsive to this request, and hereby requests that such documents be produced by the RIAA to all parties.

**Request 3:** Please provide all documents supporting the statement that "a rate of 0.5% for the statutory license is substantially equivalent to the 2% rate payable under the privately-negotiated license ..."

**Response:** Subject to and without waiving any of the foregoing General Objections, Muzak responds as follows: Mr. Funkhouser relied upon his general knowledge of and experience in the music industry when making this statement. Mr. Funkhouser is Vice President of Programming & Licensing of Muzak, and has served in that capacity since 1987. Prior to joining Muzak, he was Programming & Production Manager for Yesco Foreground Music, beginning in 1983. Before entering the business music field with Yesco, he had extensive experience in a variety of music fields, including broadcasting, studio recording, teaching, consulting and record company management, including the formation of his own

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Steven M. Marks

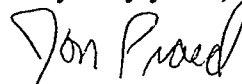
January 8, 1997

Page 5

commercial and music production company. In addition, the statute itself, and all accompanying legislative history, are responsive to this request, and hereby incorporated. Muzak also believes the RIAA and/or its members are in possession of documents responsive to this request, including the privately-negotiated contracts, and hereby requests that the RIAA produce all such documents to all parties.

Third, this letter makes moot two of the RIAA's motions to compel to the extent those motions are directed to Muzak. Based on our conversation from yesterday afternoon, I understand that this letter moots the RIAA's second and fourth motions to compel to the extent those motions are directed to Muzak. Both motions were filed on December 27, 1996. The former was entitled "Motion to Compel Services to Identify to which Request Each Produced Document is Responsive." The latter was entitled "RIAA's Motion to Compel Muzak to Produce Documents." Please advise me immediately if my understanding is incorrect. Otherwise, I would appreciate your filing an appropriate and timely request to withdraw those two motions with the Copyright Office.

Very truly yours,



Jon L. Praed

of LATHAM & WATKINS

cc: (via facsimile)  
Fernando Laguarda  
Joni Lupovitz